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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 82

SERGEANT HERBERT N. CARRINGTON,

Petitioner,

vs.

ALAN RASH *et al.*,

Respondents.

REPLY BRIEF FOR THE PETITIONER

Petitioner's Reply to Respondent Carr's Argument I

In Respondent Carr's brief his first argument (pages 4-7) is that the cases which hold that the equal protection clause applies to suffrage should be re-examined in light of historical material presented in Justice Harlan's dissenting opinion in *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

Petitioner submits that it is unnecessary for this court to re-examine its numerous holdings applying the Fourteenth Amendment to voting rights. If the equal protection clause protects any rights from discriminating state laws, it certainly protects voting rights which are basic in our democracy. Authorities supporting this proposition are numerous. See the majority opinion in *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

Petitioner's Reply to Respondent Carr's Argument II

In Respondent Carr's second point (pages 7-13), he argues that when Congress re-admitted Texas to the union in 1870, it interpreted a provision in the Texas constitution which disfranchised servicemen, as not violating the Fourteenth Amendment. Petitioner submits that it is improbable that Congress, in re-admitting Texas to the union, gave any deliberate consideration to any questions analogous to the constitutional question presented in this case. Therefore, any constitutional interpretations made by Congress when it re-admitted Texas to the union, should be given little or no consideration in deciding this case.

Respondent Carr made this same argument in *Mabry* v. *Davis*, 232 F.Supp. 930 (1964). At page 938, the three-judge court summarily disposed of the contention by referring to the following statement from Chief Justice Warren's opinion in *Reynolds* v. *Sims, supra*:

> "Congress simply lacks the constitutional power to insulate states from attack with respect to alleged deprivations of individual constitutional rights."

Petitioner's Reply to Respondent Carr's Argument IIIA

In Respondent Carr's Argument IIIA (pages 13-18), he says, "Voting is a privilege and not a right." (See Respondent Carr's brief, pages 2 and 13.) In *Wesberry* v. *Sanders*, 376 U.S. 1, 11 L ed. 2d 481 at 492 (1964), Justice Black made it abundantly clear that Art. I, Sec. 2 of the Constitution, "gives persons *qualified* to vote a constitutional right to vote . . . " The recent apportionment cases cited on pages 11-14 of the Brief of the Petitioner clearly establish

that the Fourteenth Amendment protects the right to vote of all *qualified* voters.

The effect of Art. VI, Sec. 2 of the Texas Constitution is to disfranchise all Texas servicemen who entered the service outside of the State of Texas. Thus, this court must determine whether or not the Fourteenth Amendment will permit the State of Texas to classify a serviceman residing in Texas as an *unqualified voter* solely because he is in the military service and did not reside in Texas when he entered the service. Petitioner submits that it is unreasonable for the State of Texas to classify members of the military service as *unqualified voters* solely for the reason that they are in the military service and resided outside of the state when they entered the service.

Petitioner's Reply to Respondent Carr's Argument IIIB

In Argument IIIB of Respondent Carr's brief (pages 18-34), he presents the historical background of the military voting laws in Texas. He refers to the historical fact that in 1836, after the Battle of San Jacinto, members of the military were rebellious and posed a serious threat to civil authority. After presenting such fact, the brief states: "Burned as a child, Texas has continued to be wary of the fire . . . " Respondent Carr is apparently saying that Texans presently fear members of the military because of the incident that occurred in 1836. Petitioner submits that the military structure in this country has changed substantially in the past 120 years, and that therefore the voting restrictions on servicemen which may have been reasonable in 1845 are not necessarily reasonable today.

On pages 20 and 22 of Respondent Carr's brief, he indicates that Texas, by restricting servicemen's voting

rights, is counter-attacking "a threatened danger." The "threatened danger" seems to be that if servicemen could vote in the county where they are stationed, a "strongwilled, determined commander," through "pressure" and "persuasions," could control the votes which would determine the outcome of the local election and he could thereby dictate the policy of the community. (See pages 22 and 23 of Respondent Carr's brief.)

Since all elections in Texas are by secret ballot, the "pressure" or "persuasion" that could be exercised by a military commander could not be so coercive that the military voter could be prevented from voting his own convictions once he entered the voting booth or began marking his secret ballot. (See Article VI, Section 4 of the Texas Constitution which provides that all elections shall be by secret ballot.) If the military voter at the time he casts his ballot chooses to yield to such "pressure" or "persuasion" and vote as his commanding officer desires, he has a right to do so. Likewise, civilian voters, as a result of "pressure" or "persuasion" may choose to vote in accordance with the desires of their employers, or their Labor Union officers, or the officers of their professional organizations, or some other persons in positions of authority.

The State of Texas, by restricting the servicemen's voting rights for the reason that they might be persuaded to vote in accordance with the desires of their commanding officers, is unreasonably distinguishing servicemen from civilians and such distinction denies servicemen equal protection of the laws.

Respondent Carr, in Argument IIIB, further contends that the State of Texas should be allowed to prevent a concentration of military voting strength in areas where military bases are located because the balance of power in

a particular community might rest with a group whose members are only *temporary residents* of the place where they are stationed. Petitioner will readily admit that there are many members of the military service stationed in Texas who do not meet the residence requirements and, therefore, such servicemen should not be allowed to vote. Petitioner's contention is that if a serviceman does meet the same residence requirements that are imposed upon all civilians regardless of their occupations, then such serviceman should not be denied the right to vote in the county of his residence solely because he is in the military service.

On page 27 of Respondent Carr's brief he contends that "The temporary nature of the soldier's residence at his duty station . . . " constitutes "a reasonable basis for excluding him from the privilege of voting at that place." If the matter of concern were that a soldier's residence is of a temporary nature then it would seem that the State of Texas would also disfranchise the soldier's wife who has met the very same residence requirements as the soldier. Yet the wife can qualify to vote in the county where her husband is stationed. Certainly the residence of a soldier's wife is as temporary as that of her military husband. To distinguish between the two denies members of the military equal protection of the laws.

Respondent Carr, on page 3 of his brief, argues that, since members of the military are "only temporary residents of the place where they are stationed" they "might lack a proper understanding of local problems and a proper concern for the best interest of the community." There are many groups of civilians who could fit into this category. For example, employees of large national corporations are often employed for a limited number of years in a particular local community and for that reason they "might lack a proper understanding of local problems." Also, members of college faculties, as well as graduate students, are

often located at a particular school for a limited number of years, and they "might lack the proper understanding of local problems and a proper concern for the best interest of the community."

Respondent Carr apparently is contending that the civilians are the only voters in a community that should be allowed to determine what is in the best interest of the community. Petitioner contends that if the majority of the voters in a community are members of the military, then that majority should be given a voice in determining the "best interest of the community." To distinguish a serviceman from a civilian because a serviceman "might lack a proper concern for the best interest of the community" denies a serviceman equal protection of the laws.

Petitioner's Reply to Respondent Carr's Argument IIIC

Respondent Carr says that "the restriction on place of voting is not a denial of voting rights." (See page 3 of Respondent Carr's brief.) This statement is incorrect. The voting restriction imposed upon servicemen by the Texas Constitution denies Petitioner the right to vote anywhere in any local, state or national election so long as he remains in the service and resides in Texas. Respondent Carr recognizes this fact but contends that Petitioner and other servicemen similarly situated "voluntarily" gave up their right to vote when they selected Texas as the state of their residence. Petitioner never voluntarily gave up his voting rights. If he had, he would not be going to the trouble and expense of this litigation in order to gain the right to vote. Because of the Fourteenth Amendment no citizen of the United States can be forced to "voluntarily" relinquish his right to vote merely by choosing to reside in a particular state.

Petitioner's Reply to Respondent Carr's Argument IIID

Respondent Carr in Argument IIID (pages 39-42) states that there are "substantial distinguishing characteristics" between the military profession and other professions and occupations. On pages 40 and 41 of his brief he lists several characteristics of the military profession which might distinguish it from other professions and occupations. Petitioner submits that none of the distinguishing characteristics present a valid reason for denying servicemen the right to vote in the county of their residence. One distinguishing characteristic listed by Respondent Carr is that there is "cohesion" among military groups. If cohesion among members of a group can constitute a valid reason for restricting the voting rights of members of the group, then the State of Texas could probably restrict the voting rights of members of numerous other organizations, such as the Teamsters Union, the National Association for the Advancement of Colored People, and the American Medical Association.

Petitioner's Reply to Respondent Carr's Argument IIIE

In Argument IIIE of Respondent Carr's brief, he recognizes that Petitioner is a bona fide resident of El Paso County. However, Respondent Carr states that Petitioner's acquiring a bona fide residence in Texas is not typical of members of the military stationed in Texas. Petitioner submits that there are other servicemen stationed in Texas who, like Petitioner, have established a bona fide residence in Texas after entering the service in another state. Some servicemen have passed up promotions in order to remain at their newly acquired residence in Texas. Some servicemen are homeowners and have paid local and state taxes

for many years. Petitioner is certainly not the only serviceman in Texas who can prove, if given the chance, that he is a bona fide resident of the state.

In Argument IIIE of Respondent Carr's brief, he indicates that the voting restriction in question may impose some inequities in a few isolated cases. However, Respondent Carr contends "that the classification is not rendered invalid by reason of the fact that isolated cases of inequity may arise under it." Respondent Carr apparently contends that it is not improper for the State of Texas to restrict the voting rights of those servicemen who happen to be able to meet the same residence requirements as civilians. Petitioner submits that the right to vote in a democracy is so basic and so essential that such right should never be restricted by any state unless the state can show that an overwhelming public interest will be served by such a restriction. Respondent Carr, in his brief, has failed to present any valid reasons which could justify the voting restrictions placed upon servicemen by the Constitution of the State of Texas.

Conclusion

For reasons stated it is respectfully submitted that the Judgment of the Court below should be reversed.

Respectfully submitted,

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